230685

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

SUPPLEMENTAL COMMENTS OF

ALLIANCE FOR RAIL COMPETITION
AMERICAN CHEMISTRY COUNCIL
AMERICAN COALITION FOR ETHANOL
AMERICAN FOREST AND PAPER ASSOCIATION
AMERICAN PUBLIC POWER ASSOCIATION
ARIZONA ELECTRIC POWER COOPERATIVE, INC.
ARKANSAS ELECTRIC COOPERATIVE CORP.
BASIN ELECTRIC POWER COOPERATIVE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
CONSUMERS UNITED FOR RAIL EQUITY
COOPERATIVE NETWORK
EAST RIVER POWER COOPERATIVE
EDISON ELECTRIC INSTITUTE
GOPHER CURE
GRAND CANYON STATE ELECTRIC COOPERATIVE ASSOCIATION
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NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL FARMERS UNION
NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
NEBRASKA WHEAT BOARD
OHIO CHEMISTRY TECHNOLOGY COUNCIL
OKLAHOMA WHEAT COMMISSION
PORTLAND CEMENT ASSOCIATION
SOUTH DAKOTA WHEAT COMMISSION

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION
TEXAS WHEAT PRODUCERS BOARD
THE FERTILIZER INSTITUTE
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
THE CHLORINE INSTITUTE
WASHINGTON GRAIN COMMISSION
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JOINT SUPPLEMENTAL COMMENTS

The undersigned parties submit these Joint Supplemental Comments to the Board. We are all either rail dependent shippers or represent rail dependent shippers and all have participated in this proceeding, either through our own filings and appearances at the two days of hearings or through participation in group filings with the Surface Transportation Board (Board). We submit these comments primarily on a central issue that arose during the two days of hearings: Would shippers that depend on rail service rather have increased access to potentially competing railroads or an improved rate regulation process at the Board? We will also comment on other issues that came into focus during the two days of hearings in this proceeding.

INCREASED ACCESS TO RAIL-TO-RAIL COMPETITION OR IMPROVED RATE REGULATORY PROCESS OR BOTH

Not surprisingly, the major freight railroads, in their advocacy in this proceeding, suggested that they favor no increase in access to rail-to-rail competition and indicated that the current regulatory program of the Board is sufficient to protect rail dependent shippers from unreasonable rates and unreasonable railroad practices.

During the hearings, some rail-dependent shippers suggested that they are not at all sure that the freight railroads would compete even if the Board increases access to potentially competing rail carriers. Other rail-dependent shippers testified that they believe the railroads will compete if the current problems preventing access to potentially competing railroads are corrected. In the face of these conflicting positions, Commissioners asked the logical questions: Do you believe the railroads will compete if the access issue is addressed? What will happen if the railroads refuse to compete? Rather than address the access issue, should the Board address its rate regulatory program?

The answer to these questions from the undersigned rail dependent shippers is somewhat nuanced. We want increased access to rail-to-rail competition, but we need the rate regulatory process of the Board to be accessible to rail dependent shippers. Thus, we also ask that you make one change to and one clarification of your rate challenge procedures to increase rail customer access to the Board.

INCREASED ACCESS TO COMPETING RAILROADS

The Post-1980 Regulatory Regime Presumes a Competitive Rail System

As the Board knows well, for most of the twentieth century, the freight rail industry was subject to a pervasive regulatory regime that presumed that all rail

activities were regulated. Central themes of that regulatory regime were (1) the requirement that the railroad seek the prior approval of the federal regulator, the Interstate Commerce Commission, before taking action with respect to rates charged to or service of its customers and (2) protection of the individual railroads from incursions into their customer bases from other freight railroads.

The Staggers Rail Act of 1980 established a much different regulatory regime that was later refined further by the Interstate Commerce Commission Termination Act of 1995. The central theme of this new regulatory regime is that competition is the "regulator" of choice with respect to the relationship between a freight railroad and its customer. Thus, the presumption of the current regulatory regime is deregulation. No prior notice and approval from the federal regulator, this Board, is required for most railroad activities. Rather, the rail customer, if aggrieved and qualified to complain to the Board, bears the burden of "movement" to access the Board and the burden of proof to obtain relief. The undersigned rail-dependent shippers accept this bargain as the natural result of the deregulated regime approved by Congress in 1980.

However, what the undersigned rail-dependent shippers do not accept is the continued protection of the customer base of the individual railroads from competition from another railroad. This protection policy is reflected in the "bottleneck" decisions and the current "reciprocal switching" and "access to terminal facilities" rules of the Board. This protection is a feature of the old, discredited regulatory regime that existed before 1980 and has no place in the "presumed deregulation" regime that was launched in 1980.

The very compelling testimony of the panel of chemical companies on the second day of the hearing made the case that a regulatory system of presumed deregulation does not work well with the type of protections from competition of individual railroad customer bases that were a feature of the discredited, pre-1980 regulatory regime. Denied reasonable access to rail-to-rail competition, these rail-dependent companies must access the rate regulation protections of the Board.

However, the bundling practices of the freight railroads, the confiscatory tariff rates that are applied by the railroads to force companies to sign unfavorable contracts, and the limitation on damages recoverable under the simplified rate case processes of the Board all converge to deny rail dependent customers reasonable access to the remedies of the Board. Primarily because these confiscatory tariff rates must be paid during the pendency of a rate challenge, one chemical company (PPG) representative testified that his company estimates that a rate challenge at the Board would cost the company $20 million. PPG filed a letter with the Board on July 15, 2011 that provides supporting details of this estimate. Another chemical company representative testified that their company estimate is $12 million.

For these reasons, the undersigned rail-dependent shippers ask the Board to modify its rules to allow increased access to potentially competing railroad

systems. The law and the regulatory regime are designed to work best in a competitive environment.

Reciprocal Switching and Access to Terminal Areas

Again, the undersigned rail-dependent shippers believe that rules that protect an individual railroad's customer base from competition from another railroad simply are not consistent with the post-1980 law and the regulatory regime based on that law. As Commissioners observed several times during the hearing, the current rules of the Board on reciprocal switching and access to terminal areas simply are not working. The "competitive abuse" standard has resulted in no access rulings favorable to rail customers in over twenty years. Testimony to the Board was that no one has even tried to use the current rules in over fifteen years.

Most of us recommend changes to the current reciprocal switching and terminal access rules that are the same or similar to the recommendations contained in the recent National Industrial Transportation League petition for rulemaking to the Board docketed as Ex Parte No. 711.

Bottleneck/Through Routes

Simply adopting more pro-competitive rules on competitive switching and access to terminal areas will not address the problems of all rail-dependent shippers. Therefore, we recommend that the Board require that rates be provided across bottlenecks to potentially competing rail systems when requested by a rail customer. In order to achieve access to competition, the undersigned rail dependent customers are prepared to agree to bottleneck rates that may exceed the jurisdictional threshold of the Board, but are tied to an established metric administered by the Board.

We also support the through route proposal provided to the Board by the Concerned Captive Coal Shippers. This proposal, plus a requirement to provide bottleneck rates tied to an established metric administered by the Board, would provide access to competition while addressing the revenue needs of the freight railroads. We believe the adoption of both of these mechanisms would provide a choice to rail-dependent shippers. Over time, the Board, the railroads and rail-dependent shippers will understand which of these approaches to achieving increased access to competing railroads works best.

IMPROVEMENTS TO THE RATE REGULATORY PROGRAM

Even if the Board adopts all of the pro-competitive changes in its access rules that have been recommended by rail customers, we recognize that some "captive" rail customers, primarily due to geographic location, will never gain access to potentially competing rail carriers. Other captive rail customers may not benefit from pro-competitive improvements in the access rules. As the

Commissioners posited during the hearings, the major freight railroads may refuse to compete even after pro-competitive access changes are adopted.

For shippers that must have access to the rate regulatory program of the Board, based on the testimony at the hearings and the questions posed by the Commissioners, we recommend one change to and one clarification of the current program. We believe these two actions would greatly improve access to the Board for captive rail customers.

Absence of Effective Competition for Rail-Dependent Shippers Served By Two Railroad Systems

One problem that was brought to the attention of the Board by panels of coal shippers on both days of the hearing concerned the plight of rail customers with access to two rail systems. Many of these rail customers have enjoyed effective rail-to-rail competition in the past, but now find that one or both rail systems no longer will compete for their transportation business. In such a situation, despite having physical access to two rail systems, the rail customer is as captive as if the customer had physical access to only one railroad.

Even though no case has been brought to the Board yet with this fact situation, and the rules on market dominance require such determinations to be made on a case by case basis, the Board heard concerns that it would interpret mere physical access to two carriers as conclusive proof of effective competition, such that railroad market dominance over the rail customer is absent. Such an approach would foreclose the ability of such shippers to seek any relief from what they believe are unreasonably high rates. We suggest that this problem can be resolved by a simple policy statement by the Board clarifying that the market dominance test is met when a complainant can demonstrate the absence of effective transportation competition, even if the rail customer is physically connected to more than one railroad system.

Remove the Damage Limits on the Board's Simplified Procedures for Challenging the Reasonableness of a Rate

The undersigned rail-dependent shippers believe it is well-established that the full Stand Alone Cost (SAC) test provides the lowest reasonable rate for captive rail customers under the current rate standard of the Board. The three benchmark test (which compares the challenged rate to other existing rates) and the simplified SAC test both will result in reasonable rates that are higher than the rate that would be established by a full SAC case.

The simplified procedures were adopted by the Board in response both to a requirement of the Interstate Commerce Commission Termination Act of 1995 and long running complaints by rail customers that a full SAC case is just too expensive and time consuming for most captive rail customers. The Board received ample testimony from rail customers at the recent hearings that the damage limitations on the two simplified rate procedures, in light of the large

costs of pursuing a rate challenge at the Board, limit the usefulness of these simplified procedures.

The simplified procedures were adopted to make the Board's rate challenge process more accessible to captive rail customers. The Board has received testimony that the damage limitations are making these simplified procedures less useful than they should be. The limitations on damages seem to have no public policy rationale, unless it is to reduce captive rail customer access to these rate challenge processes.

Thus, we, the undersigned rail-dependent shippers, ask that the damage limitations on the simplified rate challenge procedures be removed.

SUMMARY

The adoption of pro-competitive access rules that increase access to potentially competing railroads, at prices that address the financial needs of the railroads as well as the financial needs of their customers, and the recommended simple change to, as well as one clarification of, the rate challenge program, taken together, will help to address the legitimate concerns of rail customers. These changes will help ensure access to the Board by rail-dependent shippers, even if the railroads refuse to compete in a more pro-competitive national rail system. We believe these proposed changes in the current regulatory program also recognize and address appropriately the financial needs of the freight railroads.

OTHER ISSUES

Paper Barriers

On the second day of the hearing, many rail-dependent shippers were interested to learn that there are about 90 "paper barriers" in existence around the nation. We share Commissioner Mulvey's notion that transparency about these paper barriers would be a good first step in addressing rail customer concerns with paper barriers. We support increased transparency concerning existing paper barriers.

Mediation and Arbitration

We commend the Board for its ongoing proceeding in Ex Parte No. 699, Assessment of Mediation and Arbitration Procedures. Measures, such as mediation and arbitration, and the Board's own informal complaint process, that result in less costly and quicker settlement of disputes between rail-dependent shippers and the railroads enjoy broad support in the rail-dependent shipper community, so long as these mechanisms are not used by the railroads to increase rate case costs and delays

Railroad Financial Health

Rail-dependent shippers recognize the need for a financially healthy national freight rail system and have paid dearly over at least the last twenty years to ensure such a system. We note that the statutory goal of the current law is that the freight railroads be able to "attract and retain capital in amounts adequate to provide a sound transportation system in the United States" (49 U.S. C. § 10704(a)(2)(B)). With the stock of the major freight railroads on the "buy" or "hold" lists of Wall Street analyst shops for at least the last seven or eight years and with no evidence that the freight railroads are unable to obtain capital through the issuance of bonds or other forms of indebtedness, rail-dependent shippers believe the railroads are in sound financial health.

Despite this and other evidence of financial health, the test adopted by the Board continues to indicate that the major freight railroads achieve "revenue adequacy" only episodically. Rail-dependent shippers believe the problem is in the test of the Board, not in the financial performance of the freight rail industry.

We recognize that the Board faces significant funding constraints. Nevertheless, we encourage the Board to undertake an internal review of both its current test and its application of that test to determine whether the Board believes this indicator should continue to be used as the sole indicator of railroad financial health.

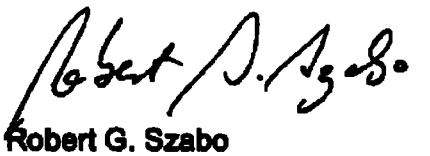
CONCLUSION

We representatives of the rail-dependent shipper community thank you for initiating this proceeding, as well as your proceeding in Ex Parte No. 704. We thank you for the two excellent days of hearings and the obvious engagement of the Commissioners in trying to determine an appropriate path forward.

We encourage the Board, after reviewing the record of this proceeding, to move forward to the consideration of modifications to its current regulatory program that will help to ensure increased access to competing railroads and increased captive rail customer access to the rate-regulatory program of the Board.

We stand ready to work with the Board to achieve modifications to its current regulatory program that will work for both the freight railroads and their rail-dependent customers as we all attempt to move the nation's economy forward, through increased exports and increased American jobs.

Respectfully submitted,



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Consumers United for Rail Equity
and on behalf of the following:

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